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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 513

HUGH BREEDING, INC., a corporation,
Petitioner,

VERSUS

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1957.

BITTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8750

SUBJECT INDEX

PAGE

Opinions Below 1

Grounds on Which Jurisdiction is Invoked 2

Questions Presented for Review:

1. Substituting its judgment for that of the trial court on a motion to transfer the cause;

2. Not following the law of this case as expressed in its former opinion in the same case, and substituting its judgment as to the conclusions to be drawn from the facts for those of the jury and trial court 2

Statement of the Case 3

Reasons for Allowance of the Writ 5

Proposition I:

The Court substituted its judgment for that of the trial judge on the motion to transfer the cause, departing from its opinion on the first appeal and also from all precedent 6

Proposition II:

The Circuit Court substituted its judgment for that of the jury, and departed from the law of the case expressed in its former opinion 22

Conclusion 31

INDEX CONTINUED

PAGE

AUTHORITIES

CASES:

Broad v. Pennsylvania R. Co., 357 Pa. 478, 55 A.2d 359 29-30

Drennan v. Pennsylvania Casualty Co., 162 Kan. 286, 176 P.2d 523 29

General Portland Cement Co. v. Perry, 204 F.2d 316 ..... 3, 8, 12-13

Headrick v. Atchison, T. & S. F. Ry. Co., 182 F.2d 305 ..... 3, 9

Jenkins v. Wilson, 104 F. Supp. 422 8

Johnson v. Killion, 179 Kan. 571, 297 P.2d 177 28

Lewis v. American Airlines, 91 F. Supp. 31 8

Lucas v. New York C. R. Co., 88 F. Supp. 536 8

Markantonatos v. Maryland Drydock Co., 110 F. Supp. 862 8

Mason v. Chicago, R. I. & P. R. Co., 96 F. Supp. 361 8

Mazinski v. Dight, 99 F. Supp. 192 8

Moore v. Atlantic Coast Line R. Co., 201 N.C. 26, 158 S.E. 556 30

Nicol v. Koscinski, 188 F.2d 537 10-11

Norwood v. Kirkpatrick, 99 L. Ed. 789, 349 U.S. 29, 75 Sup. Ct. 544 ..... 3, 7

Padgett v. Atlantic Greyhound Corp., 126 F. Supp. 124 8

Quinn v. Simonds, 199 F.2d 416 (cert. den., 345 U.S. 964, 97 L. Ed. 1383, 73 Sup. Ct. 947) 7

Qurcher v. Pittsburgh Ry. Co., 353 Pa. 212, 44 A.2d 581 30

Rhodes v. Barnett, 117 F. Supp. 312 8

INDEX CONTINUED

PAGE

Schaaf v. Coen, 131 Ohio St. 279, 2 N.E.2d 605 30
Strypek v. Schreyer, 118 F. Supp. 918 8
Sulter v. Pere Marquette Ry. Co., 230 Mich. 489, 202 N.W. 967 30

STATUTES:

Title 28, Sec. 1404(a) 6, 7

APPENDIX

Opinion, filed United States Court of Appeals, Tenth Circuit, March 19, 1956, in the case of Chicago, Rock Island and Pacific Railroad Company, a corporation, v. Hugh Breeding, Inc., a corporation, No. 5199, Huxman, Pickett, United States Circuit Judges, and Mellott, United States District Judge i

Second Opinion, filed July 24, 1957, United States Court of Appeals, Tenth Circuit, in Chicago, Rock Island and Pacific Railroad Company, a corporation v. Hugh Breeding, Inc., a corporation, No. 5503, and Hugh Breeding, Inc., a corporation, v. Chicago, Rock Island and Pacific Railroad Company, a corporation, No. 5504, Phillips, Pickett and Lewis, Circuit Judges, Phillips, Circuit Judge ix

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HUGH BREEDING, INC., a corporation,
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RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree of the Court of Appeals for the Tenth Circuit, entered after rehearing on August 21, 1957, reversing in part and sustaining in part the decree and judgment of the United States District Court for the Western District of Oklahoma, entered August 22, 1956.

OPINIONS BELOW

The opinion of the court below in the former appeal, officially reported as 232 F.2d 582, and the opinion of the court below filed July 24, 1957, not officially reported at

this time, are for convenience attached to this petition as an Appendix.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the decree sought to be reviewed and the date of its entry are July 24, 1957.

The date of the order denying a rehearing is August 21, 1957.

The statutory provision believed to confer on this Court jurisdiction to review the decree in question by writ of certiorari is the United States Code, Title 28, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Petitioner contends the Circuit Court erred in the following:

1. Substituting its judgment for that of the trial court on a motion to transfer the cause.

2. Not following the law of this case as expressed in its former opinion in the same case, and substituting its judgment as to the conclusions to be drawn from the facts for those of the jury and trial court.

Petitioner, a resident of Oklahoma, in good faith, began this action in Oklahoma against respondent, an Illinois Railroad Company, for damages arising out of a collision near Wichita, Kansas. The railway maintained its district office, supervising the operations where the accident occurred at El Reno, Oklahoma. The District Court at Oklahoma City twice denied the application of the railway com-

pany to remove the case to Kansas. The Circuit Court of Appeals for the Tenth Circuit on a former appeal sustained the action of the trial court. On the second appeal, now sought to be reviewed, the Circuit Court of Appeals has ordered the District Court to transfer the case to Kansas. This order is in conflict with opinions of the other circuits (such as *General Portland Cement Co. v. Perry*, 204 F.2d 316), the Supreme Court (*Norwood v. Kirkpatrick*, 99 L. Ed. 789, 349 U.S. 29, 75 Sup. Ct. 544), former opinions of the Tenth Circuit (*Headrick v. Atchison, T. & S. F. Ry. Co.*, 182 F.2d 305), and the former opinion of the Circuit Court in this very case (232 F.2d 582).

Petitioner contends that the transfer from Oklahoma to Kansas is an arbitrary and erroneous abuse of power by the Circuit Court of appeals against a resident of the State of Oklahoma denying him right to a trial in the state of his residence against a railroad company operating in his state. Under the superintending power of the Supreme Court it has not only the right but the duty to prevent this arbitrary exercise of power by the Tenth Circuit Court of Appeals. It should not permit the opinion as filed to confuse future litigants as to forum and transfer of causes, and confuse District Courts as to their powers.

STATEMENT OF THE CASE

These are cross-suits for damages, arising out of the collision of respondent's freight train with petitioner's gasoline truck, which had become stuck on a grade crossing, near Wichita, Kansas, on December 21, 1953. This is the second appeal in the case.

Original jurisdiction in the Federal Court was by reason of the diversity of citizenship of the parties.

The facts out of which the litigation arises may be briefly stated as follows:

There was a driving snow storm which limited vision to a few feet near the ground. A gasoline transport truck owned by petitioner came to a stop, as required by law, before proceeding across respondent's grade crossing at the outskirts of Wichita, Kansas. When the driver attempted to cross the tracks, his driving wheels became stuck, so he could go neither forward nor backward. Before help could be obtained, respondent's heavily loaded train approached the crossing. Signalled about a thousand feet away, the engineer applied the brakes, but was unable to stop the train before it crashed into the truck. The high octane gasoline in the truck caught fire, and it was a total loss, and the train was severely damaged.

The trial court first denied an application to remove the suit from the Western District of Oklahoma to Kansas, and rendered a summary judgment in favor of the trucking company and against the railway company.

The Circuit Court of Appeals, reviewing the order and judgment, found that the railway company did not make a showing requiring removal of the cause, but found that the matter of negligence should have been submitted to a jury.

The District Court again denied an application to remove the suit to Kansas, and upon trial verdict was rendered against each company in its claim against the other.

Both parties appealed from this judgment, and upon review, the Circuit Court rendered judgment affirming the judgment that the trucking company take nothing, reversing the judgment that the railway company take nothing, and ruling that the trial court abused his discretion in not transferring the cause to Kansas.

REASONS FOR ALLOWANCE OF WRIT

Petitioner believes the second decision in this case is so greatly at variance with the first decision in the same case that in its supervisory duties the Supreme Court should consider the matter.

Petitioner believes that when a court has decided matters of law in a case, which decision has not been appealed from, that becomes the law of the case, and the court is thereafter bound to follow it.

Petitioner further believes that the Circuit Court, in holding the trial court abused its discretion in refusing to transfer the cause, departed from the standards universally recognized as judicial discretion in such transfers.

These matters are of such importance as a guide to future conduct of litigation by the Circuit and trial courts, that the Supreme Court should consider the judgment of the Circuit Court for the Tenth Circuit.

Proposition I.

The Court substituted its judgment for that of the trial judge on the motion to transfer the cause, departing from its opinion on the first appeal and also from all precedent.

First Opinion

These statements (of 20 Kansas witnesses) in our opinion are insufficient to discharge the heavy duty resting upon the railroad to obtain a transfer of the case to the Kansas Court. We reach this conclusion without taking into consideration the considerable burden on the plaintiff, a resident of Oklahoma, to bring or compel its witnesses to come to Wichita.

Second Opinion

We think it clearly appears from the second motion that the convenience of parties and witnesses and the interests of justice would have been served by transfer of the action to the United States District Court for the District of Kansas for trial at Wichita, Kansas. We are of the opinion that the trial judge abused his discretion in denying such motion. Should a like motion be interposed on remand of the case, it should be granted.

The authority for transfer of causes is in Title 28, Sec. 1404(a), as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

We are unable to find any case in which a plaintiff brings an action in the state of his residence, against a railroad company having division headquarters for the place where the accident occurred, where the action of the trial judge in refusing to transfer the cause was set aside.

In *Norwood* v. *Kirkpatrick*, 99 L. Ed. 789, 349 U.S. 29, 75 Sup. Ct. 544, decided April 11, 1955, suits were filed in Pennsylvania against a railway for injuries received in an accident which occurred in South Carolina. The District Court granted motions to transfer the actions to South Carolina. The plaintiffs applied for a writ to require the District Judge to set aside the orders of transfer, which was denied by the Court of Appeals, and their action was affirmed by the Supreme Court. The Court says:

> "As a consequence, we believe that Congress, by the term for the convenience of parties and witnesses, in the interests of justice, intended to permit courts to grant transfers upon a lesser showing of inconvenience (than under the former rules requiring dismissal). This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

A dissenting opinion by Justice Clark, in which the Chief Justice and Justice Douglas concurred, held that the trial judge had not exercised his discretion, under the rules applicable to the doctrine of *forum non conveniens*.

No suggestion is made that the trial court would have abused his discretion had he retained jurisdiction of the cases in the state of the plaintiffs' residence.

Actions of District Judges in denying a transfer under Section 1404(a) have been sustained on appeal under the following circumstances:

Suit in Pennsylvania for wrongful death occurring in Ohio. *Quinn* v. *Simonds*, 199 F.2d 416 (*cert. den.*, 345 U.S. 964, 97 L. Ed. 1383, 73 Sup. Ct. 947).

Suit in Illinois, personal injuries arising out of an accident in Texas. *General Portland Cement Co.* v. *Perry*, 204 F.2d 316.

District Courts have denied a transfer in the following:

Suit in Missouri for personal injuries arising out of an accident in Colorado. *Mason* v. *Chicago, R. I. & P. R. Co.*, 96 F. Supp. 361.

Suit in New York, for personal injuries arising out of accident in Maryland. *Markantonatos* v. *Maryland Drydock Co.*, 110 F. Supp. 862.

Suit in New York, for personal injuries arising out of an accident in Pennsylvania. *Rhodes* v. *Barnett*, 117 F. Supp. 312; *Strypek* v. *Schreyer*, 118 F. Supp. 918.

Suit in Pennsylvania, for personal injuries arising out of accident in Virginia. *Padgett* v. *Atlantic Greyhound Corp.*, 126 F. Supp. 124.

Suit in Pennsylvania for personal injuries arising out of an accident in Tennessee. *Mazinski* v. *Dight*, 99 F. Supp. 192.

Suit in New York, for death arising out of an accident in New Jersey. *Jenkins* v. *Wilson*, 104 F. Supp. 422.

Suit in New York, for death arising out of an accident in Pennsylvania. *Lucas* v. *New York C. R. Co.*, 88 F. Supp. 536.

Suit in New York, for death arising out of accident in Texas. *Lewis* v. *American Airlines*, 91 F. Supp. 31.

Suit in Tennessee, for death arising out of accident in New Jersey.

In *Headrick* v. *Atchison, T. & S. F. Ry. Co.*, 182 F.2d 305, the plaintiff, a resident of Missouri, brought suit in New Mexico for personal injuries arising out of a California accident. The Circuit Court in connection with a motion for transfer of the cause to California states:

> "Under the provisions of the statute, it is necessary, prior to making a transfer under Section 1404(a), that the court find that such transfer will be not only for the convenience of the parties and their witnesses but further that it is in the interests of justice. *Ex Parte Collett, supra; Schoen* v. *Mountain Producers Corporation, supra;* Reviser's notes, Title 28 U.S.C.A. § 1404 (a); House Report 308, 80th Congress, 1st Session, A. 132. In the *Gulf Oil* case, Justice Jackson says: 'Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' 330 U.S. 501, 67 S. Ct. 843. Moore observes that this language was used prior to the enactment of § 1404(a) and the court was dealing with *forum non conveniens* at a time when, if applied, would result in a dismissal. He thinks that now the courts may properly utilize the doctrine more freely than when dismissal resulted. With this we agree but we are of the view that, even though now a dismissal will not result, the doctrine should not be applied, and the plaintiff's choice of forum disturbed, unless the balance in the defendant's favor is shown by clear and convincing evidence."

In the case at bar (1) the plaintiff is a resident of Oklahoma; (2) the driver for plaintiff, a most important witness, is a resident of Oklahoma; (3) the division office of the defendant, the headquarters of the portion of defendant's line where the accident occurred, is in Oklahoma; (4) the records of defendant pertaining to the train involved

in the accident were in Oklahoma, (5) several witnesses both for plaintiff and defendant resided in Oklahoma; (6) the Western District of Oklahoma adjoins Kansas, where the accident occurred; (7) the plaintiff chose to bring the action in Oklahoma. All of these were factors to be considered by the trial judge in connection with the motion to transfer the cause. Perhaps the members of the Circuit Court, if sitting as trial judge, might have reached a different conclusion as to the transfer of the cause, but that in itself is insufficient to indicate the judge abused his discretion.

The parties had all the important witnesses present at the trial, justifying the confidence of the trial judge that convenience and justice would be satisfied by permitting the action to be tried in the forum in which plaintiff brought it.

The statement in the opinion of the Court on page 33, that the "second motion made a much stronger showing of grounds for transfer than did the first motion", is accurate only to the extent that evidence of witnesses is stated with more particularity in the second motion.

On the first appeal, the matter was considered within the discretion of the trial judge. A more detailed statement should not take the matter out of his discretion.

In *Nicol* v. *Koscinske*, 188 F.2d 537, the Court states:

> "It is clear that whether the order stands or is set aside, one of the litigants will be inconvenienced, and it became the duty of the district judge to balance inconveniences and to determine upon which litigant the greater hardship would rest, if he granted change of

venue, and that determination was subject to the rule that unless the balance is strongly in favor of the defendant the plaintiff's choice of forum should rarely be disturbed.

"Determination as to the greater convenience or inconvenience must rest within the sound judicial discretion of the district judge to whom the petition for change of venue is addressed, and his decision should not be set aside unless there is apparent an abuse of discretion. This is so whether we accept the view of Judge Frank in *Ford Motor Co. v. Ryan*, 2 Cir., 182 F.2d 329, 331, that the judge must guess and that we should accept his guess unless it is 'too wild,' or whether to the problem by Judge Learned Hand in the same case, who felt that to set aside an order the balance of convenience must be strong enough to declare a finding of the district judge 'clearly erroneous.'

"It must be observed that the greater number of witnesses reside in Nebraska; that the premises upon which the accident is said to have occurred is there; that the devise which contributed to it is there; that the persons who installed the apparatus are likewise there and that the law to be applied is the law of Nebraska. It must also be observed that only one of the petitioner's witnesses, other than herself can testify as to the manner in which the injuries were received; that the others are all physicians, nurses, hospital attendants, and others, who attended the plaintiff at Jackson. Experience in review of personal injury cases teaches that the basic question is always one in respect to negligence or contributory negligence, and upon that issue the only witnesses for the petitioner are herself and her woman companion. Her claim as to the extent of the injuries would, it seems to us, not seriously be threatened by the necessity for taking depositions of doctors, dentists and hospital attendants."

In sustaining the action of the trial court there permitted a trial in Michigan for damages arising out of an accident which occurred in Nebraska.

In *General Portland Cement Co.* v. *Perry*, 204 F.2d 316, also relied on in the opinion of the Circuit Court, the accident occurred in Dallas, Texas, suit was filed in Chicago, Illinois. The Court states:

> "In the affidavit of the defendant's attorney supporting the motion for transfer he says that he has 19 witnesses from Texas which he will need and will use in the trial of the case and that there are no witnesses residing in Chicago. On the other hand, the plaintiff's affidavit opposing the transfer states that there were no eyewitnesses in the vicinity at the time the accident occurred and that there were no attendants or witnesses on the remotely controlled conveyor car which struck him and caused his injuries. Although the defendant's attorney said at the hearing before Judge Perry that he had the written statements of his 19 witnesses with him, he neither introduced the statements into evidence, gave the names of the witnesses nor indicated what their testimony would be. At the close of the hearing the defendant's attorney did hand to Judge Perry some papers which he said were the statements of his witnesses but, according to Judge Perry's answer filed in this court, he (Judge Perry) decided as he started to read one of the statements that it would be unfair to the plaintiff to read the statements and possibly be influenced by them when they were not a matter of record and their contents were not known to the plaintiff.
>
> "The question of convenience of the witnesses was one of the vital issues presented by the defendant's motion to transfer. In our opinion the defendant failed

to sufficiently show the necessity for the testimony of his witnesses."

The affidavit for change of venue in this case is as follows:

"Nell Rhodes Fisher, being first duly sworn, deposes and says:

"That she is one of the attorneys for the defendant in the above-entitled action, which is brought for property damage alleged by plaintiff to have been sustained by it as a result of a highway-railroad grade crossing collision near Wichita, Kansas, on the 21st day of December, 1953, when plaintiff's gasoline transportation truck was involved in a collision with one of defendant's freight trains. According to the best of affiant's knowledge, information, and belief, the following facts are true:

"1. Subsequent to the filing of this action, defendant instituted suit in the United States District Court for the District of Kansas against the plaintiff, Hugh Breeding, Inc., a corporation, and its insurance carrier, Casualty Reciprocal Exchange, a corporation, seeking recovery of the sum of $215,000.00 because of damages suffered by the defendant as a result of said collision, the style of said cause being Chicago, Rock Island and Pacific Railroad Company, a corporation, Plaintiff, vs. Hugh Breeding, Inc., a corporation, and Casualty Reciprocal Exchange, a corporation, Defendants, No. T-821.

"2. The alleged accident occurred near the town of Wichita, Sedgwick County, State of Kansas, on or about December 21, 1953.

"3. At the time of the accident and since, plaintiff has been an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma, which is the

Northern Federal Judicial District for the State of Oklahoma.

"4. At the time of the accident and since, plaintiff's agent, Marion Gainer, who was driving the transport truck at the time of the collision, has resided at 3100 North Sheridan Road, Tulsa, Oklahoma, in the Northern Federal Judicial District of the State of Oklahoma.

"5. The presence and testimony of the following witnesses, all of whom have personal knowledge of some of the facts material to the contested issues, will be essential to the defense of this case:

Chicago, Rock Island & Pacific RR. v. *Breeding:*

"Floyd Schroeder, 2010 Payne, Wichita, Kansas; Al Boyle, 230 North Knight, Wichita, Kansas; R. J. Gill, 5140 Valentine Road, Wichita, Kansas; Albert Hale, 825 North Custer, Wichita, Kansas; Floyd Hicks, 3415 East Central, Wichita, Kansas; William O'Brien, 2805 Timberlane, Wichita, Kansas; G. E. Weaver, 3752 North St. Francis, Wichita, Kansas; Kathryn Buttram, 1511 North Emporia, Wichita, Kansas; Floyd A. Haun, Harrington, Kansas; Hobart L. Porter, Harrington, Kansas; Alfred Byers, Harrington, Kansas; Ordel E. Cosley, Harrington, Kansas; J. K. Macomber, 2101 North Waco, Wichita, Kansas; Allen Rush, Wichita, Kansas.

"6. Only five of the above named witnesses are employed by the defendant. Not one of the witnesses above named are within the range of legal process of the Court in which plaintiff has filed this action. All are within the range of legal process of the United States District Court of Kansas, to which defendant seeks this transfer.

"7. If this case is tried in this Court it will be necessary for each of the witnesses listed above in Paragraph 5, who live in Harrington, Kansas, to travel 246 miles to be in attendance in Court in Oklahoma City.

whereas if this case is transferred they will have to travel only 73 miles to Wichita. It will be necessary for each of the witnesses listed in Paragraph 5, who live in Wichita, Kansas, to travel approximately 173 miles to be in attendance at Court in Oklahoma City, whereas they could attend Court in Wichita without travel. Since the plaintiff has its principal place of business in Tulsa, Oklahoma, and their agent truck driver lives in Tulsa Oklahoma, it will be necessary for the officers of the corporation and their agent truck driver to travel approximately 120 miles for attendance in Court in Oklahoma City, whereas they could attend Court in Wichita by traveling a distance of 184 miles.

"8. Witnesses Haun, Porter, Byers, Cosley, and Macomber are employees of the Rock Island railroad and live in Harrington, Kansas. All witnesses coming from Harrington, if Rock Island transportation is used, will require six hours of travel time, whereas if the case is transferred to Wichita, witnesses living in Harrington will require only eighty minutes travel time. Non-employee witnesses, Gill, Schroeder, Boyle, Hale, Hicks, O'Brien, Weaver, and Buttram, live in Wichita and will not require any travel time for attendance at Court in Wichita, whereas to attend Court in Oklahoma City, they will require six hours of travel time, in addition to the time required to be in attendance at Court with the additional increase of expenses upon the defendant railroad for travel expenses, hotel facilities, and meals. Furthermore, if this case is transferred to the United States District Court for the District of Kansas the witnesses living in Wichita will not be required to be away from their employment except for the time required for their presence on the witness stand, whereas if they should agree to come to Oklahoma for trial they would be required to be away from their employment during travel time plus the time required to take the witness stand. Two of the most

important witnesses for the defense of this case, Schroeder and Boyle, are now the Sheriff and Deputy Sheriff, respectively, of Sedgwick County. It is doubtful, because of their positions at the time, that the defendant could persuade them to come to Oklahoma City for trial. These two men investigated the accident and are essential witnesses.

"9. There will be no facts to be proven by any witnesses residing within the jurisdictional limits of this Court.

"10. Defendant cannot adequately present its defense to plaintiff's claim at trial of this case in Oklahoma City because:

"a. Defendant cannot compel the attendance of nonemployed witnesses at the trial, and it will be unable to persuade the majority of said witnesses to voluntarily appear.

"b. The jury could not be sent for a view of the accident if considered desirable.

"11. A trial to this action in this Court would be excessively costly to the defendant when compared to trial at Wichita, Kansas.

"12. Defendant is suable in the United States District Court for the District of Kansas as well as the United States District Court for the Western District of Oklahoma. If this action is transferred to the United States District Court for the District of Kansas, it will serve the convenience of the parties and serve the interest of justice.

"13. The defendant in good faith denies liability in this case and would show that the witnesses referred to in Paragraph 5 herein would testify generally as follows:

"a. Floyd Schroeder, now Sheriff of Sedgwick County, was Captain of the Road Patrol for Sedgwick County, Kansas, at the time of the accident. He will testify that he thoroughly investigated the accident; that he interviewed and took statements from the plaintiff's truck driver; that the driver had chains for all of his tires available on the truck, but that he did not put them on before leaving the Phillips Petroleum plant just prior to the accident; that the driver had regular burning-type flares, also reflectors and red flags on his truck, but that he did not use them in an attempt to flag the train. He will further testify as to the position of the truck after the accident and as to the condition of the railing upon the highway at the place where the truck became stalled in the snow before it was hit by the defendant's train.

"b. Al Boyle, now Deputy Sheriff of Sedgwick County, was at the time of the accident Sergeant in charge of the Records Division of accidents, and would bring the necessary records into Court and testify in regard thereto.

"c. R. J. Gill will testify that he was approximately 100 yards from the grossing when this accident occurred. He will testify as to the weather conditions, visibility, the condition of the highway, and to facts pertaining to the burning headlights on the defendant's train.

"d. Albert Hale will testify that he witnessed the collision between plaintiff's truck and defendant's train, the condition of the highway, and as to visibility on the night in question. He will further testify as to the actions of the truck driver just prior to the accident, the position of the stalled truck in relation to the railing along the highway, as to whether or not the lights on the stalled truck were burning, the speed of the train, and how far it travelled after the accident.

"e. Floyd Hicks will testify that he witnessed the collision, as to the condition of the highway, visibility, the distance between the vehicle in which he was traveling and the stalled truck when the stalled truck was picked up by his headlights, and as to whether the truck's headlights were burning and in what direction.

"f. William O'Brien, an employee at the Phillips Station where the truck driver filled the transport just prior to the accident, will testify as to the time expiring between the time the transport left the Phillips dock and the collision. He will testify as to how far he ran down the track and what means he used in an attempt to flag the defendant's train, and as to facts concerning visibility and the lights on both the truck and the train.

"g. G. E. Weaver, who also attempted to flag the train, will testify as to the manner in which he attempted to stop the train, the speed of the train, visibility, and the condition of headlights.

"h. Kathryn Buttram, switchboard operator for Phillips Petroleum will testify in regard to facts tending to establish whether or not plaintiff's truck driver made any attempt to call the defendant railroad immediately after the truck became stalled.

"i. Hahn, the engineer in charge of defendant's freight train on the night of the accident; Cosley, the conductor; Byers, the fireman; and Porter the head brakeman, will testify as to the weather conditions, visibility within the range of the headlight of the train, the speed the train was travelling just prior to the accident, in regard to rules of the defendant railroad, as to the distance between the train and the truck at the time it was picked up by the headlight of the engine, as to whether or not the lights on the truck were burning, and as to the distance between the train and the

truck when the two witnesses, who were attempting to flag the train, were first seen by those in the cab of the engine.

"j. J. K. Macomber, a telegrapher for the defendant, will testify as to what procedure is followed in stopping a train when he receives a message that something is wrong up the line, and as to when and how he received a message on the night involved in this accident.

"i. Allen Rush, a trooper for the Road Patrol of Sedgwick County would testify that he was at the scene of the accident shortly after it occurred and made an official investigation; that he took paint samples from the truck and the railing which ran along the highway where the truck had become stalled in the snow, and that such samples had been analyzed. He would further testify as to the condition of the road or highway at the scene of the accident, tire marks, and as to the important facts concerning the position of the truck. The paint analyses in his control can be reached only by subpoena issued to this witness, for he has informed the defendant that he cannot come to Oklahoma unless subpoenaed.

"Nell Rhodes Fisher."

Eleven witnesses are named in the affidavit.

Eight of these were produced in person at the trial by plaintiff or defendant. The testimony of one Kathryn Buttram, switchboard operator for Phillips Petroleum Co., was given by deposition. She was not an eyewitness to the accident.

The remaining witnesses were Al Boyle, whose testimony is stated to be:

"b. Al Boyle, now Deputy Sheriff of Sedgwick County, was at the time of the accident Sergeant in charge of the Records Division of accidents, and would bring the necessary records into Court and testify in regard thereto" (R. 16).

"j. J. K. Macomber, telegrapher for the defendant, will testify as to what procedure is followed in stopping a train when he receives a message that something is wrong up the line, and as to when and how he received a message on the night involved in this accident" (R. 17-18).

W. K. Walker, a consulting engineer formerly a public utility engineer for the Oklahoma Corporation Commission, testified as an expert on behalf of plaintiff.

Ed Barthulnew, signal and communications supervisor for defendant on the division, resident of El Reno, Oklahoma, produced a graph which showed times of departure, slowing, and stopping of the train involved in the accident. He testified that all of the records of the division which included Wichita, Kansas, were kept at the division headquarters at El Reno, Oklahoma.

Lyle Breeding, manager of plaintiff corporation, and a resident of Oklahoma, testified on behalf of plaintiff.

In addition to all of these Oklahoma witnesses, both for plaintiff and defendant, it should be taken into consideration that plaintiff is an Oklahoma corporation and that plaintiff elected to bring its action in Oklahoma. Its choice of forum should not be interfered with unless there are compelling circumstances, not present in this case.

The testimony as to the records was produced by other witnesses. The testimony as to procedure was produced

from the division office of defendant as at El Reno, Oklahoma.

The material Kansas witnesses, with the exception of the train crew, were all produced by the plaintiff at the Oklahoma trial. The defendant was not put to any trouble or expense or placed at any disadvantage, by having the trial in Oklahoma near its division headquarters.

A stipulation as to the testimony of L. L. McComber, was made at the trial (R. 178).

We respectfully submit that the fact all the important witnesses were available in person, substantiates the good judgment of the trial court in overruling the motion of defendant to change the venue to a more convenient forum. The matter was within the judicial discretion of the trial court. Under the authority of *All States Freight* v. *Modarelli*, 196 F.2d 1010, and *Loew's Inc.* v. *McGuire*, 205 F.2d 719, the statement of the trial court that he has considered the convenience of the parties and witnesses in the interest of justice, is conclusive. The trial court so stated in effect by his order:

> "Upon consideration, motion for change of venue is overruled" (R. 19).

The wisdom of this ruling is further shown when it developed at the trial that the division headquarters of the railway company were at El Reno, Oklahoma, in the Western District and only some 30 miles from the courtroom where the trial was held.

R. W. Thomas, County Surveyor of Oklahoma County, Oklahoma, was called as a witness by plaintiff to identify

a map of the scene of the accident and point out important points thereon.

Marion Gainer, the driver of plaintiff's truck, lived at Tulsa, Oklahoma.

Proposition II.

The Circuit Court substituted its judgment for that of the jury, and departed from the law of the case expressed in its former opinion.

First Opinion

Whether it was negligence on his (the engineer's) part under such conditions to operate his train at 40 miles per hour is to say the least a question upon which resonable minds might differ. We, therefore, think it was a question of fact for the jury and not for the court.

Second Opinion

Accordingly, we conclude that the speed of the train, under the existing circumstances was not a fact upon which Breeding could predicate a claim of negligence on the part of the railroad company.

First Opinion

Here the train was approaching a large city where highway traffic was bound to be heavy. 37th Street adjoined the City of Wichita on the north. It is doubtful if it can be said that this constituted open country.

Second Opinion

The crossing was located in open country and not in a thickly populated area.

There was no substantial difference in the testimony on these points at the first and second trials, except that the testimony at the second trial was even more favorable to the trucking company.

The crossing did not change with respect to its location between the first and second trial, and neither did the testimony in regard to its location or the volume of traffic thereon. The following extracts from the testimony at the second trial tend to prove that the crossing was in a heavy industrial and populated area, and the traffic was heavy:

ALLEN RUSH, a trooper with the Kansas Highway Patrol, testified:

Q. "Now, 37th Street there is a heavily traveled street or highway, is it not?

A. It is a heavily traveled street." (R. 44).

WILLIAM H. O'BRIEN, a loader for the Phillips Petroleum Co., testified:

Q. "Is that 37th Street a heavily traveled street there in Wichita?

A. Yes, it is.

Q. Traffic is moving on it all day and all night, is that correct, sir?

A. That's correct.

Q. Quite a bit of truck travel in addition to passenger traffic?

A. Yes, sir" (R. 76).

ALBERT HALE, a dockhand at Fleming's Warehouse, testified:

Q. "Now, 37th Street, is it a heavily traveled street there in the north end of Wichita?

A. Yes, it is" (R. 99).

CLARENCE SWARTZ, an employee of the railroad, testified:

Q. "As you come into Wichita from the northeast as this train was doing, when you hit 37th Street you are approaching a populated area of the city of Wichita, are you not?

A. Well, you are within a half mile.

Q. Well, you are getting into this industrial area?

A. Yes.

Q. You understand I didn't mean populated areas where people live in houses?

A. That's right, I understand.

Q. Well, let's include the industrial area. You are coming into the populated industrial area of Wichita?

A. That's right.

* * * * * * * * *

Q. Well, there is quite a bit of traffic on 37th Street, Mr. Baughman?

A. Yes, sir, there is. I'd say not heavy traffic. (R. 131).

* * * * * * * * *

Q. * * * But in this area that we are talking about, this two and a half mile area from Kline's Station down toward Wichita northwest is all built up with packing houses, chemical stations, and Phillips Petroleum loading dock is probably the farthest north, is that not right?

A. That's right" (R. 135).

The foregoing excerpts from the testimony show that the jury, the trier of the facts, was warranted in reaching

the conclusion that the crossing was located in a congested heavy industrial area immediately adjacent to a large city, and that the traffic was heavy at the crossing. The Appellate Court is not warranted in making a finding contrary to a finding helpful in supporting the verdict and for which competent evidence was admitted by the trial court.

The conclusion that traffic was light because only four vehicles approached the crossing during six to 15 minutes on the night of this terrific blizzard, is astounding. It is remarkable that any traffic, on roads or rails, could move on the night of this accident.

First Opinion	*Second Opinion*
It is without dispute that visibility was very poor and that because of whirling and swirling s n o w along the ground the engineer could see but a very short distance ahead of the engine.	* * * visibility * * * was at least 1,000 feet from the engineer's position in the cab, as the train approached the crossing.

There was competent evidence before the Circuit Court on the second trial that visibility was extremely limited. Allen Rush, the trooper, testified that visibility varied from 90 to 180 feet (R. 42). Marian Gainer testified the visibility was about a block (R. 62). Gilbert Weaver testified the visibility was about a block (R. 74). Ford Hicks testified visibility varied from 30 feet to a block and a half (R. 90). Albert Hale testified he could see the clearance lights on the stalled truck from a distance of three or four hundred yards (R. 99). Hobart Porter testified there was poor visibility "down low" and fair visibility as high as a block signal, 15 or 18 feet above the ground (R. 147-148). Alfred

Byers testified he could see a thousand or fifteen hundred feet down the track immediately before the collision (R. 157). R. J. Gill testified visibility on the ground was 20 or 25 feet (R. 162).

The learned members of the Circuit Court who heard the first appeal concluded that the negligence of the railway company and of the trucking company, if any, were matters of fact for the determination of a jury. Its opinion, not appealed from, became the law of this case. The learned members of the Circuit Court who heard the second appeal, concluded that there was no evidence to support a finding the railway company was negligent, and that there was evidence which conclusively showed the trucking company was negligent. To do this they disregarded all the facts favorable to the trucking company, and assumed facts favorable to the railway company on which there was no testimony presented.

For example, the opinion of the Court contains this erroneous statement:

> "The evidence wholly failed to establish that the condition of the planking on the crossing caused the truck to stall, or in anywise contributed to the accident" (Opinion, p. 15).

The record contains ample evidence from which the jury could conclude the defective crossing caused the truck to stall.

The driver of the truck testified he stopped his transport truck, as required by law, before driving across the railroad track. After his driver wheels were in the center

of the track, the tractor started slipping, and he found he could go neither forward or backward (R. 54, 55).

He further testified:

Q. "Well, what caused your truck to stick?

A. Well, sir, it was in between the tracks and just wouldn't move.

Q. Well, did the rear wheels of your trailer have anything to do with it?

A. As far as I know they didn't.

Q. Well, were they off of the paved portion of the drive in there next to that rail?

A. As far as I could tell, they weren't" (R. 60).

As to the condition of the crossing, the driver testified:

Q. "And tell us about that crossing there as to whether the crossing itself, the rails and the center part and the forepart, is it level, smooth, or is it not?

A. No, sir, it's not smooth.

Q. Will you tell us how it is?

A. Well, sir, these—it's—it has boards between the rails that run lengthwise with the rails. And they are covered with asphalt and they are swayed down where the rails stick up higher than what the boards are" (R. 57).

Ford Hicks testified as follows:

Q. "Tell the jury what the condition of that crossing was with reference to the rails, the center portion and the deal on either side.

A. It was an ordinary crossing, rather rough I'd say, it had a few holes in it where it had been dug out by applying air brakes to hot asphalt, and the rails

protruded above the surface of the ground an inch or two.

Q. That would be the two rails that the train runs on were up above the ground part an inch or so?

A. Yes, sir, it was rough. It was bad.

Q. What was in the center there? What did they have in the center of that track?

A. I wouldn't know, sir.

Q. In other words, coming over it, as I understand it, you would come up over one rail and then down to the level of the road, then up this inch or so over the other rail, is that right?

A. That's right" (R. 97).

This is ample for the jury to have determined that the crossing was defective, and this defective condition caused the truck to become stationary between the rails.

As justification for their change of the law, the opinion states erroneously that the law of Kansas was changed between the first and second opinions.

The case of *Johnson* v. *Killion*, 179 Kan. 571, 297 P.2d 177, referred to on page 21 of the opinion, decided May 5, 1956, does involve the same grade crossing involved in this accident. The opinion does not purport to change the law of Kansas as expressed in previous decisions, in fact, in the portion of the opinion of the Kansas Court quoted on page 22, the Court states the contention of the plaintiff "has never been the law of this state." The opinion refers to the opinion in a former appeal in the same case, decided May 7, 1955, and reported in 178 Kan. 154, 283 P.2d 433, which is made a part of the later opinion by reference. It

does not appear from the facts stated in either opinion that unsual weather conditions were involved in the accident there considered. No allegations to this effect are contained in the petition filed.

The Kansas Court does not in this case decide whether the crossing would have had "peculiar conditions" had a storm been in progress.

All the railroad company was entitled to was submission of the matters of negligence to a jury, and this was done under proper instructions from the court.

The general rule is the same in Kansas as it is elsewhere. This is stated in *Drennan v. Pennsylvania Casualty Co.*, 162 Kan. 286, 176 P.2d 523, as follows:

> "This is in line with the sound rule that questions of negligence are ordinarily for the trier of the facts, and that such questions should not be withdrawn from the jury except where the acts of commission or omission have been such that a court can say that it is clear that no man of ordinary prudence would have committed them under the attendant and undisputed facts and circumstances. Few, if any, rules are more firmly established."

The Court in *Broad* v. *Pennsylvania R. Co.*, 357 Pa. 478, 55 A.2d 359, states:

> "Plaintiff stopped, looked and listened, and, when he neither saw nor heard a train approaching, he proceeded onto the track. There his truck stalled, throught no fault of his own. The entire interval of time between the first stalling of the truck and the crash was but 30 to 35 seconds. The train, travelling at 40 to 45 miles an hour, traversed the 1,045 feet, for which distance its engineer had an unobstructed view

of the crossing, in about 16 seconds. Under the circumstances, plaintiff was confronted by a sudden emergency, and was placed in a position of great peril. In such a situation, all plaintiff was required to do was to exercise his best judgment. Obviously, only a jury could properly apply the standards of care required by a reasonable and prudent person placed in like circumstances."

To the same effect in *Qurcher* v. *Pittsburgh Ry. Co.*, 353 Pa. 212, 44 A.2d 581; *Moore* v. *Atlantic Coast Line R. Co.*, 201 N.C. 26, 158 S.E. 556; *Sulter* v. *Pere Marquette Ry. Co.*, 230 Mich. 489, 202 N.W. 967; *Schaaf* v. *Coen*, 131 Ohio St. 279, 2 N.E.2d 605.

The Court in its second opinion states:

"Ordinarily, what we decided in the former opinion would constitute the law of the case. However, the phrase 'the law of the case' merely expresses the practice of courts generally to refuse to reopen what has been decided and is not a limitation on their powers."

The opinion then states that the rule will not be applied where the evidence on the second trial was materially different, nor where the state court whose law is being interpreted has rendered a decision at variance with the ruling of the Federal Court.

Neither of these statements may properly be applied to the case at bar, as examination of the record and of the Kansas opinion referred to disclose.

Without multiplying authorities, the rule that the law of the case is binding on subsequent proceedings that many courts have followed it although conceding the first opinion was erroneous. Hundreds of decisions from state and fed-

eral courts are collected in Words and Phrases, Permanent Edition, under the heading, "Law of the Case."

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit should be granted.

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Of Counsel:

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September, 1957.

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
Mar 19 1956
Robert B. Cartwright
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March Term, 1956

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation,
Appellant,

v.

HUGH BREEDING, INC., a corporation,
Appellee.

Number 5199

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Nell Rhodes Fisher (Robert E. Shelton of Savage, Gibson, Benefield and Shelton were with her on the brief) for Appellant;

Gus Rinehart (Butler, Rinehart & Morrison were with him on the brief) for Appellee.

Before HUXMAN, PICKETT, United States Circuit Judges, and MELLOTT, United States District Judge.

[APPENDIX]

HUXMAN, Circuit Judge.

This is an appeal from a summary judgment by the United States District Court for the Western District of Oklahoma, awarding Hugh Breeding, Inc.,[1] an Oklahoma corporation, judgment in the sum of $7,939 against the Chicago, Rock Island and Pacific Railroad Company[2] and denying relief upon its cross-complaint. Before entering judgment for Breeding, the court overruled the railroad's motion to transfer the case to the United States District Court for Kansas at Wichita for trial under the provisions of 28 U.S.C.A. § 1404 (a).

The action arose out of a collision between an oil transport truck belonging to Breeding which was stalled on the railroad crossing at 37th Street, north of the city limits of Wichita, Kansas, and a train being operated by the railroad company. The complaint alleged as grounds for recovery that the railroad company was guilty of negligence in operating its train at a high and dangerous rate of speed under the circumstances, to-wit, in excess of 40 miles per hour; that the weather and visibility were very bad; and that the agents of the railroad company failed to heed warnings by flagmen who were attempting to stop or retard the train prior to its reaching the crossing. In addition to its answer, the railroad also filed a cross-complaint in which it alleged the collision was due to the negligent manner in which Breeding operated its truck and that such negligence resulted in damage to the railroad company's equipment for which recovery was sought.

The evidence before the court in the form of depositions upon which summary judgment was granted showed these facts. Gainer, the driver of the truck, left Tulsa, Oklahoma, on the morning of the day of the accident with a

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[1] Herein called Breeding.
[2] Herein called railroad.

load of gasoline which he unloaded in Wichita, Kansas, about 5:30 p.m. It had been snowing and the roads were slick and slippery. He had chains with him but did not put them on the tires. After unloading his gasoline he went to Phillips Petroleum Company in North Wichita where he loaded his truck with more gasoline to be delivered to an air line company at Tulsa, Oklahoma. 37th Street is in the country adjacent to Wichita on the north. It runs east and west and is immediately south of Phillips' plant where Gainer obtained his load of gasoline. Upon leaving Phillips' plant, Gainer turned left on 37th Street, intending to cross a railroad track which was near by and at right angles to the street. As he turned left onto 37th Street, the left rear wheel of the truck slid off the north side of the street and, as he put it, he was "stuck." The tractor of the truck was sitting squarely on the railroad track.

Being unable to extricate the truck, he left it and ran to a near by place to attempt to contact the railroad office by phone but was unable to do so. In the meantime two motorists stopped and proceeded north along the right of way in an attempt to flag the train which was approaching at about 40 miles per hour. Because of the weather conditions the trainmen were unable to see them from any appreciable distance. The flagmen were observed at about the same time the truck was seen on the track. The engineer applied the emergency brake but was unable to stop before hitting the truck.

It is without dispute that visibility was very poor and that because of whirling and swirling snow along the ground the engineer could see but a very short distance ahead of the engine. One witness testified the visibility was about thirty feet. The engineer testified that conditions were nearly blizzard conditions and that at most he could see about one hundred feet and that he could not stop within the range of his vision at the speed he was going. There was testimony by a railroad brakeman that the rail-

road had a rule that "if you can't see, why then you are going to slow down to where you can see." Other railroad witness testified there was no such rule. There was other testimony "That the condition of the whole thing would govern the operation of the train." This in substance was the evidence upon which the trial court granted summary judgment for plaintiff.

Preliminary to a consideration of the principal question, we must dispose of appellant's contention that the trial court erred in refusing to sustain its motion for a change of venue from the Western District of Oklahoma to the United States District Court of Kansas at Wichita.[3] Section 1404 (a) is a new section in the Code. The subject matter thereof relates to the old doctrine of *forum non conveniens*. By the adoption of this section Congress intended to broaden the old doctrine of *forum non conveniens* and to especially ameliorate the harshest part of the old rule which required the court to either retain the case or dismiss it. It is the spirit of the new section to vest the trial court with the exercise of a reasonable discretion in determining whether it would exercise its jurisdiction or transfer the case to another forum for trial.[4] It has been held that the judgment of a trial court will be reversed only where the appellate court finds there has been an abuse of discretion.[5]

In *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501, the Supreme Court said that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should

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[3] 28 U.S.C.A., Sec. 1404(a) provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[4] *Norwood* v. *Kirkpatrick*, 349 U.S. 29.

[5] *General Portland Cement Co.* v. *Perry*, 204 F.2d 316.

rarely be disturbed." Various courts have adhered to this pronouncement.[6]

Here we have practically no dispute as to what occurred. Neither is the amount of damage suffered by either of the parties in dispute.[7] The eye witnesses to the accident are few in number and their testimony is not in conflict. They consist of the driver of the truck, the two persons who undertook to flag the train and the engineer and his fireman who were in the engine at the time of the accident. Even the conductor of the train is not a key witness. His testimony at most would seem to be cumulative and perhaps corroborative of that of the engineer and the fireman's testimony which is not disputed. The police officer and the deputy sheriff, who testified he was a candidate for sheriff, came upon the scene after the accident and can testify to nothing materially challenging the testimony of any of the eye witnesses.

The affidavit in support of the motion for transfer in substance states that the railroad will be required to have in attendance twenty witnesses who are residents of Kansas; that of these, ten are not employed by the railroad; that to compel them to attend the trial in Oklahoma will be a serious burden to them; and that the railroad cannot force nonemployee witnesses to attend the trial. These statements in our opinion are insufficient to discharge the heavy duty resting upon the railroad to obtain a transfer of the case to the Kansas court. We reach this conclusion without taking into consideration the considerable burden on the plaintiff, a resident of Oklahoma, to bring or compel its witnesses to come to Wichita.

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[6] *Nicol* v. *Koscinski*, 188 F.2d 537, and cases there cited; *General Portland Cement Co.* v. *Perry*, 204 F.2d 316.

[7] The amount of damage suffered by Breeding and the Railroad Company was stipulated.

It is not sufficient to merely state that the railroad has twenty witnesses it must transport to Oklahoma. To discharge the burden resting upon it, it was necessary to set out in the affidavit the substance of the evidence of these witnesses so the court in reaching its conclusion might consider the materiality thereof or whether it tended to establish a material fact different from that of the eye witnesses or whether it tended to contradict material testimony of other witnesses.[8] In the absence of any showing as to materiality of the evidence of these twenty witnesses, merely stating that the railroad is compelled to transport ten of its employees to Oklahoma and that it may not be able to compel the attendance of the ten nonemployee witnesses is not sufficient for us to conclude that the trial court abused its discretion in refusing to transfer the case to the Kansas court.

The allegation of negligence upon which Breeding relied for recovery was that the train was being operated at an excessive rate of speed under existing weather "to-wit, in excess of 40 miles per hour" and because of such speed the engineer was unable to stop the train in time to prevent the collision with the truck because of poor visibility. The theory upon which the court predicated its summary judgment was that it was the duty of the railroad to operate its train at such a speed so it could be stopped within the assured distance ahead and since under the undisputed facts of the case the train was not being so operated plaintiff was entitled to judgment.

It is generally held and certainly that is the established law of Kansas that a high rate of speed in the open country does not in and of itself and without more constitute negligence.[9] But Kansas has never said that a high rate of speed

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[8] *Goodman* v. *Southern Railway Company*, 99 F. Supp. 852; *Jenkins* v. *Wilson Freight Forwarding Company*, 104 F. Supp. 422.

[9] See *Chicago, Rock Island & Pacific Railroad Co.* v. *Consumers Co-operative Association* (10th Cir.), 180 F.2d 900, and Kansas cases there cited.

in open country may not under certain conditions and circumstances constitute negligence. In every case in which the Kansas court has considered the question of high or even very high rate of speed in open country, it has indicated that peculiar conditions may impose liability because of such high rate of speed, even outside the city limits. The following statement by the Kansas court in *Atchison, Topeka & Santa Fe Railway Co.* v. *Schriver*, 103 P. 994, that "it is now generally understood that an unusually high rate of speed is not of itself improper or negligent. In the open country, where no peculiar conditions exist which make it dangerous, and speed is not limited by statute, trains may be operated at any speed which the existing exigencies of public travel seem to require," appears in substance in many decisions. Here the train was approaching a large city where highway traffic was bound to be heavy. 37th Street adjoined the City of Wichita on the north. It is doubtful if it can be said that this constituted open country. Visibility was almost zero. According to the engineer's testimony he could see at most one hundred feet in front of the engine which was woefully inadequate to bring the train to a stop at the speed at which he was going. Whether it was negligence on his part under such conditions to operate his train at the edge of the City of Wichita at 40 miles per hour is to say the least a question upon which reasonable minds might differ. We, therefore, think that it was a question of fact for the jury and not for the court. Negligence ordinarily is a fact question and that is so even though there be no conflict in the evidence if different conclusions can be drawn therefrom. It is only in those rare cases where but one conclusion can be drawn from the evidence that a court is warranted in deciding the question of negligence as a matter of law, and this in our view is not such a case.

There is yet another reason why summary judgment should not have been entered for Breeding. The railroad's

answer as an additional defense charged the driver of the truck with negligence which in any event contributed to the accident. It was charged that he was guilty of negligence in operating the truck on the slick and slippery highway without installing the chains which he had with him. Whether chains would have prevented him from slipping into the ditch may be a disputed question of fact. The driver did testify that the roads were slick and slippery. Whether he was negligent in not attaching the chains or in respect to the other acts of negligence charged and whether such acts contributed to the accident is a debatable issue which should have been submitted to the jury.

REVERSED AND REMANDED.

As to that portion of the opinion dealing with the motion to transfer under 1404(a) (28 USCA) Judge Pickett concurs only in the result.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 5503, 5504—May Term, 1957

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation,
Appellant,
v.
HUGH BREEDING, INC., a corporation,
Appellee.
No. 5503

HUGH BREEDING, INC., a corporation,
Cross-Appellant,
v.
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation,
Cross-Appellee.
No. 5504

APPEAL AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

John A. Johnson and Robert E. Shelton (Savage, Gibson and Benefield were with them on the brief) for appellant and cross-appellee.

Gus Rinehart (Butler and Morrison were with him on the brief) for appellee and cross-appellant.

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[APPENDIX]

Before PHILLIPS, PICKETT and LEWIS, Circuit Judges.

PHILLIPS, Circuit Judge.

Hugh Breeding, Inc.[1] brought this action against Chicago, Rock Island and Pacific Railroad Company,[2] a corporation, and the Railroad Company filed a cross-complaint against Breeding, each claiming damages as a result of a collision between a diesel-powered freight train of the Railroad Company and a motor-driven gasoline transport truck of Breeding. The collision occurred at a point where Wichita's extended 37th Street intersects the main line of the Railroad Company, approximately two and one-half miles northeast of the city limits of Wichita, Kansas. At that point 37th Street is an asphalt-topped country road running east and west, the asphalt topping being 20 feet in width. At such crossing the tracks of the Railroad Company intersect the road at an angle in excess of 90°. The crossing is a grade crossing and is located 8,805 feet northeast of the Railroad Company's Kline Station.

The truck was in charge of Breeding's driver, Gainer. It was a 1947 International semi-trailer gasoline transport truck, with a 36-foot trailer attached. The entire length of the unit was 49 feet, 1 inch.

At about 10:00 a.m., December 21, 1953, Gainer left Tulsa, Oklahoma, driving a transport truck loaded with gasoline for delivery at a Texas Company station in Wichita, Kansas. From 2:00 p.m. of that day, until he reached Wichita, he drove in snow. He did not put on chains, which he carried. He encountered no sliding difficulties en route on the paved highway. There was no evidence he had gone off the paved surface at any time prior to reaching the crossing. He unloaded the gasoline in Wichita, Kansas, about

[1] Hereinafter called Breeding.

[2] Hereinafter called the Railroad Company.

5:30 p.m. Thereupon he went to the Phillips Petroleum Company, where he loaded his truck with gasoline to be delivered to an air line company at Tulsa, Oklahoma. He did not put on the chains while his trailer was being loaded, although the snow was two to three inches deep and there was ice under the snow. He intended to proceed to the east side of Wichita to spend the night with his brother. He stopped for a stop sign near the south exit of a service road leading from the Phillips loading dock to 37th Street. He then made a left-hand turn to the east, toward the railroad crossing and stopped for the crossing. Most of the turnout of the service road onto the crossing is on railroad right of way, including all of a metal guard rail to the northeast, painted white, next to which the dirt shoulder of the road drops off into a small ditch. He proceeded to a point where the drive wheels of the tractor were in the center between the railroad rails, at which point the unit became immobilized. The tractor was then pointed east, or southeast, on 37th Street and the trailer was angled northwesterly. The rear wheels of the tractor were just to the south of the metal railing.

Estimates of witnesses of the projection of the east rail of the track above the planking between rails in dry weather varied from three-fourths inch to two inches. Witnesses testified that the crossing was in "reasonably good condition", "rough" but "average", "ordinary" and "rather rough." Gainer testified he did not know why the unit became immobilized. He said the drive wheels were slipping, although in the center between the rails. He testified that the truck just wouldn't move. He told Floyd Schroeder, Sheriff of Sedgwick County, Kansas, the night of the accident that the trailer wheels went into a ditch and he was stuck across the railroad track and could not move. At the trial Gainer admitted making that statement to Schroeder.

The diesel-powered train of the Railroad Company was No. 93, an unscheduled freight. It was composed of 88 cars,

62 of which were loaded and 26 empty, and was approximately three-fourths of a mile in length. It had an aggregate weight of 4,585 tons. It was slowing when it topped a rise 3,800 feet northeast of the crossing. The collision occurred at 7:45 p.m. The freight left Herington, Kansas at 4:50 p.m. and on reaching the 37th Street crossing had traveled 67.4 miles from Herington, at an average speed of 32.8 miles per hour.

According to the testimony of Gainer, the transport truck remained on the crossing for a period of 6 to 15 minutes before the collision. Gainer did not endeavor to disconnect the tractor from the trailer by removing the king pin and permitting it to rest on a fifth wheel. There was evidence that it could have been readily disconnected under ordinary conditions, but there was no proof that it could have been done under the existing conditions. Gainer had three red electric reflectors, sufficient to reflect lights for not less than 1,000 feet. He did not put out the reflectors, either to warn travelers approaching the crossing or trains of the Railroad Company approaching the crossing, although it had been dark since 5:30 p.m. After failing in an attempt to back the truck off of the crossing, Gainer went to the first of seven Phillips houses located east of the track and north of 37th Street, where lights were on, including the east porch light, and where a PBX operator was on duty. He knocked and called out at the first house, but was unable to arouse anyone. He did not go to the fourth house, where the lights were on and where Thomas Thurman lived, was at home and had a telephone. He then returned to the crossing and made further efforts to move the transport truck forward or back, without success. He then got out a light and flagged motorist Clarence Benjamine, who was approaching from the west, and asked him to go to the Phillips plant and warn the Railroad Company by telephone. After Benjamine left, Gainer again tried to move the unit, but failed. Benjamine drove to the Phillips dock,

there loader O'Brien was putting gasoline in a truck of Gilbert Weaver, and asked O'Brien to notify the Railroad Company. O'Brien did not do so. Weaver suggested that when his truck was loaded he might be able to pull the stalled transport truck off the crossing. O'Brien then saw the engine headlights and heard the whistle of the train, which was then approximately a mile away. He ran to the garage for a flash light, picked up another flashlight in his car, and ran toward a gate in the east fence adjacent to the tracks. The gate is 300 feet from the loading rack and 1,083 feet from the crossing. The distance from the crossing, down the tracks to a point opposite the gate, is 1,094 feet, 6 inches. As O'Brien went through the gate, he looked at the intersection and could see the red clearance lights of the truck. Meanwhile, Weaver had run up the track between the rails ahead of him, waving his hat and arms. [redacted] a distance of 75 feet from a point opposite the gate to the point where the train reached him. The engineer did not see Weaver, but the fireman did. O'Brien went down the west side of the tracks about 50 feet and waited until he thought the engineer was close enough to see his flashlights and then began blinking them. The engineer saw the flashing or reflection of the lights out of the corner of his eye, coming from the bank on the right, about even with his head, on top of the cut, and while he was looking straight ahead and he almost immediately saw the image of the truck, as did the fireman and brakeman, who instantly warned him. He cut the throttle and applied full emergency air to the brakes. The train was equipped with a Westinghouse AB air brake system and the braking power on the train was normal. The train's speed had been reduced upon leaving Peabody, Kansas; and particularly, from a point five miles north of Wichita, at Kechi, as it climbed the grade which crests 3,800 feet northeast of the crossing, the speed had been reduced five or six miles per hour. At the time of the emergency application the brake valve was in first position,

drawing off six to ten pounds of air, which dropped the brake shoes on the wheels, creating friction thereon, preparatory to the Kline station stop. From the crest of the rise to the crossing, a distance of 3,800 feet, there was a substantial down grade. At the time the brakes were first applied 75 per cent of the train was traveling down grade, and at the time the brakes became fully effective, 85 per cent of the train was traveling down grade. Weaver was unable to estimate the speed of the train. Neither was Hicks, who was parked 50 feet west of the transport truck. O'Brien estimated the speed to be 45 to 50 miles per hour, but admitted he could not make an accurate estimate.

Clarence Benjamine testified:

"Q. Will you tell the jury, in your judgment, from where you were seated and what you saw there, how fast that train was traveling as it came past you, and immediately before the impact?

"A. Well, that would be a hard thing for me to say.

"Q. What is your best judgment on it?

"A. I would estimate it—I would say that it was going more than fifty miles per hour.

Q. That is your judgment about what you saw there that night? A. Yes, sir."

McGann, a witness for the Railroad Company and a maintenance engineer of the Westinghouse Air Brake Company, testified upon a consideration of all the relevant factors, including the length and weight of the train and the down grade, that it would take about ten seconds, since the brake shoes were in contact, for the air to go throughout the length of the train and bring about full application and that if the train was traveling 30 miles per hour it could have been stopped in 1,600 feet; 35 miles per hour, 2,100 feet; 40 miles per hour, 2,600 feet; 45 miles per hour, 3,300

feet; 50 miles per hour, 4,100 feet; and 60 miles per hour, 5,800 feet.

W. K. Walker, a consulting engineer, testified:

"Q. At forty miles an hour, assuming the train was traveling at forty miles an hour in what distance in feet can that train be stopped if the brakes are working properly?

"A. 695 feet.

"Q. At fifty miles an hour how many feet will it take to stop that train, if the brakes are working properly?

"A. 986 feet.

"Q. At sixty miles an hour, how many feet will it take to stop that train with that weight, those cars, and if the brakes are working normally?

"A. 1,345 feet."

However, Walker based his testimony on a mathematical formula furnished him by another railroad company. It was a secret formula and he had no personal knowledge of its accuracy. He refused to furnish counsel for the Railroad Company with a copy of the formula and they had no opportunity to cross-examine him with respect to its accuracy. He did not take into consideration the reaction time for setting the brakes and he did not take into consideration that a substantial portion of the train was traveling down grade.

O'Brien thought the engineer had not seen his blinking signal and saw no sparks flying from the wheels and heard no noise coming from the brakes to indicate their application. However, it would have taken at least five seconds in a train of this length for the brakes to take hold and ten additional seconds for a full application, and when O'Brien concluded the engineer had not seen his signals, he started

back to his office to notify the Railroad Company's superintendent.

The evidence was in conflict as to whether it had ceased snowing at the time the train approached the crossing. However, it was clearly established that there was blowing snow, creating a ground blizzard. The seat in the cab of the diesel was seven feet above the ground. The top of the truck was 7 feet 11 inches above the ground. The visibility immediately above the tracks was very poor. At and above the seven foot level it was considerably better. The engineer testified that he could not see more than 500 or 600 feet "down low." However, as the train approached the crossing, the train crew were able to see the outline of the truck on the crossing from a distance of at least 1,000 feet.

An aerial photograph of the crossing and the adjacent area clearly established that the crossing was located in open country. It was in a farming area and in addition to the group of Phillips houses, there were only a few scattered houses. Neither was the crossing in a heavily traveled area. Only four vehicles, including the Breeding truck, approached the crossing on the highway during the 6 to 15 minutes the truck was stalled on the crossing.

The evidence wholly failed to establish that the condition of the planking on the crossing caused the truck to stall, or in anywise contributed to the accident.

In its complaint Breeding alleged that at the time and place of the accident the train was being operated at a high and dangerous rate of speed, under the circumstances, and in excess of 40 miles per hour; that visibility was bad, and that the trainmen failed to heed warning of persons who were attempting to stop or retard the train prior to its reaching the crossing.

At the trial Breeding amended its complaint by alleging that the crossing was negligently maintained and was

defective and that the Railroad Company had the last clear chance to prevent the collision.

In its amended cross-complaint the Railroad Company alleged negligence on the part of Breeding, to wit: improper driving by Gainer; obstructing the crossing; failing to give warning to the Railroad Company of the obstruction; failure to operate the motor vehicle with chains.

The amount of damages to the transport truck was stipulated and the amount of damages to the train was stipulated.

The court instructed the jury in part as follows:

"The Railroad Company had the duty to maintain its crossing at 37th Street in a reasonably safe condition this included its right-of-way immediately adjacent to such crossing.

"It was the duty of the Railroad Company, through its agents and train crew, to take into consideration the condition of the weather, the visibility, the size, weight and length of the train, the fact that the train was approaching a populated city and all other conditions then prevailing, and to use ordinary care in the operation of said train in order to avoid accidents. A failure to discharge such duty would be negligence."

The court also gave an instruction on last clear chance, which, under the facts, did not fully accord with the rules laid down with respect to that doctrine by the Supreme Court of Kansas. Breeding took no exception to that instruction.

The court refused the following instruction requested by the Railroad Company:

"You are instructed that under the law, a railroad company is not required to operate its trains so that

it can stop within the assured clear distance ahead or the assured clear distance of its headlights ahead."

At the close of the evidence the Railroad Company made a motion to dismiss the complaint and Breeding made a motion for directed verdict. Both motions were denied.

At the trial the jury returned a verdict in favor of the Railroad Company on the complaint and in favor of Breeding on the cross-complaint.

Motions for a new trial were interposed by both parties. The plaintiff also moved for judgment notwithstanding the verdict. These motions were denied. Both parties have appealed.

I

The Railroad Company's Appeal

This is a second appeal in the instant case. On the former appeal this court reversed a summary judgment in favor of Breeding.[3] In the opinion that case we, in part, said:

> "It is generally held and certainly that is the established law of Kansas that a high rate of speed in the open country does not in and of itself and without more constitute negligence. But Kansas has never said that a high rate of speed in open country may not under certain conditions and circumstances constitute negligence. In every case in which the Kansas court has considered the question of high or even very high rate of speed in open country, it has indicated that peculiar conditions may impose liability because of such high rate of speed, even outside the city limits. * * * Here the train was approaching a large city where highway traffic was bound to be heavy. 37th Street adjoined the City of Wichita on the north. It is doubtful if it

[3] *Chicago, Rock Island and Pac. R. Co.* v. *Hugh Breeding, Inc.*, 232 F.2d 584.

can be said that this constituted open country. Visibility was almost zero. * * * Whether it was negligence on his part under such conditions to operate his train at the edge of the City of Wichita at 40 miles per hour is to say the least a question upon which reasonable minds might differ. We, therefore, think it was a question of fact for the jury and not for the court. * * *"

Ordinarily, what we decided in the former opinion would constitute the law of the case. However, the phrase "the law of the case" merely expresses the practice of courts generally to refuse to reopen what has been decided and is not a limitation on their powers.[4]

The rule will not ordinarily be applied where the evidence on the second trial was materially different from the evidence on which the prior decision was based.[5] And where, as in the instant case the question decided was one of state law, with respect to which the Federal courts are bound to follow the decisions of the courts of the state, and where subsequent to the decision of the Federal court, the supreme court of the state has rendered a decision at variance with that of the Federal court, it is the duty of the Federal court that still has jurisdiction of the case to conform its decision and judgment to the latest decision of the supreme court of the state.[6]

The record in the instant case presents a substantially different factual situation from that stated in our former opinion. The crossing was located in open country and not

[4] *Messenger* v. *Anderson*, 225 U.S. 436, 444;
Page v. *Arkansas Natural Gas Corporation*, 8 Cir., 53 F.2d 27, 31.
[5] *Page* v. *Arkansas Natural Gas Corporation*, 8 Cir., 53 F.2d 27, 31;
Crotty v. *Chicago G. W. Ry. Co.*, 8 Cir., 169 F. 593, 596;
Balch v. *Haas*, 8 Cir., 73 F.2d 974, 977, 978.
[6] *St. Louis & S.F. R. Co.* v. *Quinette*, 8 Cir., 251 F. 773, 775, 776;
Pacific American Fisheries v. *Hoof*, 9 Cir., 291 F. 306, 309;
Messenger v. *Anderson*, 225 U.S. 436, 443, 444.

in a thickly populated area. Traffic was not, in fact, heavy at the crossing and visibility, instead of being zero, was at least 1,000 feet from the engineer's position in the cab, as the train approached the crossing. Moreover, in a decision rendered subsequent to our decision in the former case, the Supreme Court of Kansas, in a case involving a collision between a transport truck and a train of the Railroad Company at the very highway crossing where the accident in the instant case occurred, held that it was not negligence to operate a railway train at such a speed that the engineer of the train could not stop the train within his range of vision of the crossing. See *Johnson* v. *Killion*, 179 Kan. 571, 297 P.2d 177. In that case an action was brought against the operator of a motor fuel transport truck and his liability insurer to recover damages for the death [redacted] engineer of the train, resulting from a collision at a grade crossing between the train and the truck. One of the defenses set up in the answer was:

> "b. In operating his engine at such a speed when he knew or in the exercise of reasonable care should have known that it could not be stopped within his range of vision of the railroad crossing."

The trial court struck subparagraph b. In sustaining that decision the Supreme Court of Kansas in its opinion, in part, said:

> "* * * the essence of appellants' position, * * * with respect to the allegations of such subparagraph is and of necessity must be that regardless of the speed involved, an engineer who is operating a railway train at such a rate of speed it cannot be stopped within his range of vision of a railroad crossing is guilty of negligence. That, as will appear from a review of our decisions which we are not here disposed to labor or discuss, has never been the law of this state. * * * Therefore we hold that under the existing facts and

circumstances the trial court did not err in sustaining appellee's motion to strike subparagraph (b) * * *."

Modlin v. *Consumers Cooperative Ass'n.*, 172 Kan. 423, 241 P.2d 692, was an action brought to recover damages for the wrongful death of an engineer of a Chicago, Rock Island and Pacific Railroad Company passenger train, which resulted from a collision at a railroad highway crossing between such train and a motor transport truck of the Consumers Cooperative Associaiton. The Association's insurer was joined as a defendant. Each defendant in its answer alleged that the deceased engineer's negligence in the operation of the train at a high and excessive rate of speed of at least 100 miles per hour, under conditions and circumstances which made it impossible for him to bring the train to a stop at the crossing when the occasion required, was the direct and proximate cause of his death." The trial court struck such defense from the answers. The view of the engineer as he approached the crossing was obstructed by a curve until he reached a point 1,900 feet from the crossing. In the opinion the court said:

> "* * * The settled law of this state is that raliroads may lawfully operate their trains at any rate of speed their business may require outside the limits of municipalities and populous communities where no peculiar conditions exist which make it dangerous for them to do so, even though the rate of speed is so great as to make it impossible for their trains to stop at crossings and that standing alone conduct of that character does not constitute actionable negligence."[7]

In that case we think the court clearly held that the fact the view of the crossing was so obstructed by the curve did not constitute a "peculiar condition", which made it

[7] See also: *Atchison, T. & S. F. Ry. Co.* v. *Judah*, 65 Kan. 474, 70 P. 346, 348;
Atchison, T. & S. F. R. Co. v. *Hague*, 54 Kan. 284, 38 P. 257, 259.

dangerous to operate the train at a rate of speed which prevented the engineer from stopping the train within his view of the crossing. If a permanent condition, like that involved in the *Modlin* case, obstructing the engineer's view was not sufficient to bring the case within an exception to the general rule, then we think it must be equally true that obstruction of the engineer's view up to 1,000 feet from the crossing, because of weather conditions, would not constitute peculiar a existing condition, creating a dangerous situation that would take the case outside the general rule. Moreover, the Supreme Court of Kansas has dealt with a situation where a view of a crossing was obstructed because of weather conditions. In *Bunton* v. *Atchison, T. & S. F. Ry. Co.*, 100 Kan. 165, 163 P. 801, the court said:

"* * * But it could not be declared that any additional duty would rest on the defendant in the operation of its trains in the open country towards travelers at such crossings, on account of the mist, fog, or rain. We have not heard it suggested that the speed must be reduced and railroad trains kept under such control that they may be stopped before they reach a railroad crossing in the open country to prevent accidents in misty or foggy weather. *Gage* v. *Railway Co.*, 91 Kan. 253, 137 P. 938, Ann. Cas. 1915B, 410, and note. The trains must be operated with dispatch. The public demands that service; and that this may be done, the duty to avoid getting run into at a railroad crossing in the open country is chiefly imposed upon the person who seeks to cross the railroad track—not out of regard for the railroad company, but because expedition of railroad operation is exacted by the public at the hands of the railroad company."

In *Pennsylvania R. Co.* v. *Stegaman*, 6 Cir., 22 F.2d 69, the court said:

"* * * The impairing of visibility by fog or snow is a common condition. Highway crossings in the country

very commonly come once a mile. If it were in the discretion of a jury to say that it is negligence to maintain regular and ordinary speed, within any reasonable limits, through the open country in a fog, it would be necessary, under such a condition, to abandon all time schedules. If such a restriction is reasonable and is in the public interest, it should be made by the Legislature. * * *"

We have shown that the travel at the crossing was not particularly heavy, but even if there had been considerable travel over the crossing, under the decisions of the Supreme Court of Kansas that fact would not have made speed an element of negligence.

In *Land v. St. Louis & S. F. R. Co.*, 95 Kan. 441, 148 P. 612, the court quoted with approval from *Atchison T. & S. F. Ry. Co. v. Judah*, 65 Kan. 474, 70 P. 346, as follows:

"* * * While there was considerable travel over this crossing, yet it was not in the corporate limits of a city, but in the country. It has been held by this court that in such cases speed cannot be made an element of negligence. * * *"[8]

A large amount of travel at a crossing does not become a material element, unless it is such as to create confusion and render the noise of approaching trains indistinct and the ordinary signals difficult to be heard.[9] It is clear in the instant case that any inability to hear the noise of the approaching train or the ordinary signals was in no wise a contributing cause of the collision.

Accordingly, we conclude that the speed of the train, under the existing conditions, was not a fact upon which Breeding could predicate a claim of negligence on the part of the Railroad Company.

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[8] See also: *Atchison, T. & S. F. R. Co. v. Hague*, 54 Kan. 284, 38 P. 257, 259.

[9] *Johnson v. Union Pac. R. Co.*, 157 Kan. 633, 143 P.2d 630, 634.

Nevertheless, we are of the opinion that the Railroad Company was not entitled to an instructed verdict in its favor on its cross-complaint. The engineer and other trainmen admitted that they saw O'Brien's signals and observed the truck on the crossing at a point opposite the gate and between 1,000 and 1,100 feet from the crossing. O'Brien testified that he saw no sparks flying from the wheels and heard no noise coming from the brakes that indicated their application, up to the time that he left the scene to go back to his office for the purpose of notifying the Railroad Company's superintendent.

Walker testified that if the brakes were working properly and the train was traveling 40 miles per hour, it could have been stopped within 695 feet and if traveling 50 miles per hour, it could have been stopped within 986 feet. It is true that Walker's testimony was predicated on a secret mathematical formula, which he refused to disclose to counsel for the Railroad Company, and as to the accuracy of which he had no personal knowledge; that there was no proof that the formula was a generally accepted standard formula, and that Walker did not take into consideration the reaction time for setting the brakes or the fact that a substantial portion of the train was traveling down grade. Nevertheless, there was no objection to his testimony and no motion to strike it. We are, therefore, contrained to hold that there was some evidence that the engineer did not take immediate steps to apply the brakes and stop the train upon observing the signals and the truck stalled on the crossing, and some evidence that the engineer, by exercising reasonable care and prudence, might have avoided injury to the stalled truck after he had observed it on the crossing, notwithstanding the antecedent negligence of Breeding's driver, Gainer, and that the evidence with respect to those issues was sufficient to take the case to the jury.

II

Breeding's Cross-Appeal

The cross-appeal is predicated solely on the refusal of the court to direct a verdict in favor of Breeding on its complaint and the denial of Breeding's motion for a judgment *non obstante veredicto*.

We have concluded that the speed of the train, under the facts and circumstances, was not negligence. We have also concluded that there was no proof that the condition of the crossing was a contributing cause to the collision. While there was evidence that the east rail of the track was three-fourths of an inch to two inches above the planking, the undisputed evidence established that the drive wheels of the truck were stalled between the rails and had not reached the east rail, and there was no evidence that the slipping of the wheels was in anywise caused by the fact that the east rail projected above the planking.

Breeding's right to recovery must, therefore, be predicated either upon the negligent failure of the train crew to observe the warning signal or the doctrine of last clear chance. With respect to those issues, the evidence was in sharp conflict. Indeed, it weighed heavily in favor of the Railroad Company.

Moreover, there was evidence that the truck stalled because the rear wheels of the trailer went into the ditch near the guard rail as the result of Gainer's negligent operation of the truck. Under the evidence, there was also an issue of fact as to whether Gainer discharged his duty to avoid the collision by exercising ordinary care to warn the Railroad Company of the fact that the truck was stalled on the crossing. Gainer's duty in that respect continued up to the time that the train crew observed the truck on the crossing.

[APPENDIX]

We conclude, therefore, that there were issues of fact with respect to the Railroad Company's negligence and the contributory negligence of Gainer which required submission of the case to the jury. It follows that Breeding was not entitled to an instructed verdict or a judgment *non obstante veredicto*.

III

Two Secondary Questions

After the case was remanded on the former appeal, the Railroad Company filed a motion, supported by an affidavit, to transfer the case to the United States District Court for the District of Kansas for trial at Wichita, Kansas, under 28 USCA §1404 (a). The affidavit averred that the testimony of nine persons who were residents of the City of Wichita, Kansas, would be material to the defense in the case; that five witnesses, whose testimony was essential to the defense and who were employees of the Railroad Company, resided at Herington, Kansas, a distance of 73 miles from Wichita and 246 miles from Oklahoma City, Oklahoma; that Gainer, the driver of the truck, was a resident of Tulsa, Oklahoma, and that the distance from Tulsa to Wichita was only 64 miles greater than the distance from Tulsa to Oklahoma City; that two important witnesses for the defense occupied the offices of Sheriff and Deputy Sheriff, respectively, of Sedgwick County, Kansas. The affidavit further set up the evidence to which each of the witnesses referred to above would testify and showed that such evidence was material to the issues raised by the pleadings. The affidavit also averred that the accident occurred near the City of Wichita, Kansas, and that the principal office of Breeding was located at Tulsa, Oklahoma.

An earlier motion to transfer the case to the District of Kansas was made prior to the entry of the summary judgment. The trial judge denied that motion and his

ruling was sustained by this court on the first appeal. But the second motion made a much stronger showing of grounds for transfer than did the first motion. We think it clearly appears from the second motion that the convenience of parties and witnesses and the interests of justice would have been served by transfer of the action to the United States District Court for the District of Kansas for trial at Wichita, Kansas. We are of the opinion that the trial judge abused his discretion in denying such motion. Should a like motion be interposed on remand of the case, it should be granted.

After the case had been sumitted to the jury and they had deliberated for some time, they were returned to the courtroom and the court inquired how they stood numerically. The foreman answered that they were divided ten to two. Following that, the court gave certain supplementary instructions The Railroad Company objected to the inquiry made by the court and has assigned it as error. Breeding did not object to the inquiry and has not assigned it as error. We are of the opinion that the inquiry, taken with the supplementary instructions, was calculated to wrongfully coerce the jury and that the inquiry should not have been made. See *Berger* v. *United States*, 10 Cir., 62 F.2d 438, 439, 440, and cases there cited.

The judgment against Breeding on its complaint is affirmed. The judgment against the Railroad Company is reversed and the cause remanded, with instructions to grant the Railroad Company a new trial.